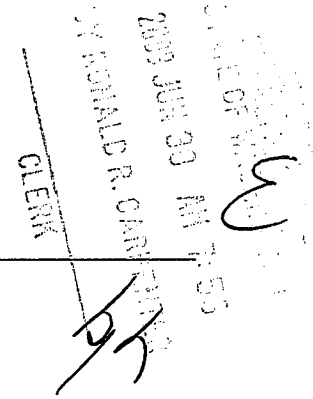
NO. 82409-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON



LEA HUDSON,

Petitioner,

vs.

CLIFFORD and "JANE DOE" HAPNER, individually, and as a marital community composed thereof, and MATTHEW NORTON, a Washington corporation,

Respondents.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable John A. McCarthy, Judge

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. NATURE OF THE CASE

After defendants requested a trial de novo from mandatory arbitration, plaintiff inexplicably failed to depose the defense medical expert, even though the defense had suggested she do so and plaintiff had said she would. To make up for this failure, plaintiff persuaded the trial court to exclude the expert. Since the defense had admitted liability and its defense was that much of plaintiff's injuries were caused by an unrelated accident, excluding the defense medical expert was crushing: the jury awarded twenty times more than plaintiff had received in arbitration.

Division II said excluding the defense medical expert was error. It ordered a new trial. This Court denied review. As a result, the verdict in the trial de novo became a nullity and the parties were returned to the position they were in before the trial de novo.

The defense then withdrew its trial de novo request. It proposed that judgment be entered against it on the arbitration award plus prejudgment interest and attorney fees. Plaintiff, who had never sought a trial de novo, now claimed the parties had to go through another trial.

II. ISSUES PRESENTED

A. May a party withdraw a trial de novo request when –

- the mandatory arbitration statute and rule both recognize withdrawals can be made,
- the withdrawing party has successfully obtained a reversal and remand for new trial on appeal so that the earlier trial and judgment are nullities, and
- the withdrawing party has volunteered to pay the arbitration award, prejudgment interest, and the opposing party's attorney fees and costs incurred in the trial court after the trial de novo request?

B. Is plaintiff entitled to attorney fees in this appeal where she sought them under MAR 7.3 and only if she is the prevailing party on appeal?

C. Is plaintiff entitled to attorney fees in the first appeal where they were denied in the first appeal and plaintiff failed to ask for them in the second appeal until her motion for reconsideration to the panel?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff/petitioner Lea Hudson and defendant/respondent Clifford Hapner were in a motor vehicle collision ("first accident"). A year later, plaintiff was in a second collision ("second accident"). She went to the emergency room twice for the second accident. (CP 76, 115)

In fact, plaintiff sought medical care at least 12 times during an 18-month period beginning a few months after the second accident. (CP 79) Even though she would later claim that the first accident caused her back and neck pain, only once did she complain about her back and never about her neck during this time period. (CP 83)

B. STATEMENT OF PROCEEDINGS.

1. Plaintiff Requests Mandatory Arbitration.

In October 1999 plaintiff sued defendant and his employer, defendant/respondent Matthew Norton. (CP 9) Plaintiff submitted the case to mandatory arbitration, where the jurisdictional limit at the time was $35,000. (CP 113) At the time, plaintiff had nearly $3,328 in medical expenses allegedly related to the first accident. (CP 124)

In November 2000 the arbitrator awarded plaintiff $14,538. Defendants requested a trial de novo. (CP 77, 118-19) Plaintiff did not.

2. Plaintiff's Post-Discovery Cutoff Disclosures Result in a Continuance.

November 13, 2001, was the original date set for the trial de novo, with a discovery cutoff date of September 25, 2001. (CP 120) Yet in October 2001, *after* the discovery cutoff and just a few weeks before trial, plaintiff identified new medical experts, claimed new medical expenses, and produced, for the first time, certain medical records dating back 9 months, to January 2001. (CP 122-25)

Faced at the last minute with this new evidence, the defense moved to exclude it or, alternatively, for a continuance to permit additional discovery. (CP 121-29) The trial court moved the trial to October 8, 2002. Trial was later rescheduled to April 9, 2003, due to courtroom unavailablity. (CP 11)

3. Plaintiff Fails To Depose Defense Medical Expert.

The defense medical expert did a medical file review in lieu of examining plaintiff under CR 35. The defense disclosed the expert and provided a summary of his opinion pursuant to CR 26(b)(5)(A)(i). (CP 189)

In October 2002 plaintiff requested the expert's report, stating, "If there is no such report, then please advise accordingly, and we will likely schedule the deposition of Dr. Colfelt as soon as possible." The defense advised there was no report and suggested that plaintiff schedule the expert's deposition. (CP 189)

Six months went by. Plaintiff failed to note the defense expert's deposition.

4. Plaintiff Gets the Defense Expert Excluded.

Having failed to take the defense medical expert's deposition, plaintiff persuaded the trial court on the first day of trial in April 2003 to exclude the defense medical expert. Plaintiff claimed that the expert's not

producing a report violated CR 35(b). (CP 189-90) However, by its terms, CR 35(b) requires a written report only when a physician conducts a personal examination of a party, which the defense expert had not done:

> The party *causing the examination to be made* shall deliver to the party or person examined a copy of a detailed written report of the examining physician . . . .

(Emphasis added.)

5. The Trial Proceeds Without the Defense Medical Expert.

At trial, plaintiff claimed neck and back pain and testified her treatment was all due to the first accident. The defense admitted liability. (CP 159, 190) Lacking defense medical expert testimony, the jury awarded $292,298, twenty times the arbitration award. (CP 79, 152) Judgment on the verdict plus costs and attorney fees, for a total of $332,878.80, was entered. (CP 153-56)

6. Defendants Obtain a New Trial on Appeal.

Defendants appealed ("first appeal"). Division II ruled that excluding the defense expert's testimony was error requiring a new trial because CR 35(b), by its terms, "requires a report, but only when an examination has been performed under CR 35(a)." (CP 191) *Hudson v. Hapner,* No. 30619-1-II (Wash. App. Apr. 12, 2005) (a copy of the opinion is at CP 187-96). In addition, the panel ruled it was error to have excluded medical records showing that plaintiff had complained about her

back only once when she sought medical care at least 12 times during an 18-month period after her second accident. (CP 79, 83-84) The panel said the exhibit "tended to disprove [plaintiff's] claim of back pain." (CP 83) This Court denied review. *Hudson v. Hapner,* 156 Wn.2d 1008, 132 P.3d 146 (2006).

7. Plaintiff Attempts To Prolong the Litigation.

By the time of remand, nearly 3 years had gone by since the trial de novo. (CP 152, 185-86) After additional discovery, defendants withdrew their trial de novo request and sought to present judgment *against them and in favor of plaintiff.* The proposed judgment included (1) the arbitration award, (2) attorney fees for the trial de novo, (3) taxable costs, (4) prejudgment interest on the principal judgment from the trial de novo request, and (5) an as yet undetermined amount of attorney fees incurred "subsequent to the mandate." (CP 1-5, 25-26)

Instead, the trial court struck the withdrawal, effectively forcing the parties to go through at least a second trial de novo. (CP 102-04)

Division II granted discretionary review and reversed ("second appeal"). *Hudson v. Hapner,* 146 Wn. App. 280, 187 P.3d 311 (2008).

IV. ARGUMENT

A. A PARTY CAN WITHDRAW A TRIAL DE NOVO REQUEST PENDING A NEW TRIAL.

1. RCW 7.06.060(1) Recognizes a Party May Withdraw a Trial De Novo Request.

Mandatory arbitration is a creature of statute, RCW ch. 7.06. The Legislature contemplated that a party such as defendants here might wish to withdraw his or her trial de novo request at least sometimes. Consequently, RCW 7.06.060(1) provides:

> . . . The court may assess costs and reasonable attorneys' fees against a party *who voluntarily withdraws a request for a trial de novo* if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(Emphasis added); *accord* MAR 7.3.

> . . . Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

MAR 7.3. The Legislature would not have authorized the trial court to assess fees and costs against a party who voluntarily withdraws a trial de novo request unless such a withdrawal were possible. *See Plein v. Lackey,* 149 Wn.2d 214, 227, 67 P.3d 1061 (2003) (statute must not be judicially construed to render any part meaningless or superfluous).

Neither the statute nor the rule places any time limit or precondition on the withdrawal. Instead, each authorizes the trial court to assess a penalty against the withdrawing party in the form of costs and

reasonable attorney fees incurred by the other party after the trial de novo request.

Although such an assessment is discretionary, defendants here have *volunteered* to pay plaintiff not only her post-trial de novo request trial court attorney fees and costs, but also prejudgment interest on the principal amount of the judgment from the date the trial de novo request was filed. (CP 4-5) Thus, plaintiff would be in the same position she would have been in had the trial de novo request never been filed.

2. A Trial De Novo Request May Be Withdrawn So Long As There Is No Valid Trial De Novo Result.

Nevertheless, plaintiff seeks to force the parties to go through a second trial de novo. She argues a party should no longer be able to withdraw a trial de novo request once the trial de novo has actually occurred. ***The defense agrees IF there is no successful appeal or CR 50, 59, or 60 motion that nullifies the trial de novo result.*** *See Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518, 528, 79 P.3d 1154 (2003).

MAR 7.2(b)(1) provides, "The trial de novo shall be conducted as though no arbitration proceeding had occurred." This Court has explained:

> We believe the trial de novo process is exactly what the rule says it is: a trial that is conducted as if the parties had never proceeded to arbitration. The entire case begins anew.

Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 528, 79 P.3d 1154 (2003). Thus, "[t]he 'trial' in the trial de novo after a failed arbitration refers specifically to the preexisting cause of action on which the parties were entitled to a trial before the arbitration." *In re Smith-Bartlett,* 95 Wn. App. 633, 641, 976 P.2d 173 (1999). After the trial, the only relief available is appeal or a motion under CR 50, CR 59, or CR 60.

Here, there was a successful appeal that nullified the trial de novo result. The Court of Appeals ruled that the defense was entitled to a new trial.

When a new trial is granted, "'the case stands as if there had been no trial.'" *Legal Adjustment Bureau v. West Coast Constr. Co.,* 153 Wash. 509, 513, 280 P. 2 (1929). ***The parties are put back into the position they were in before the trial de novo occurred.*** There is no judgment in existence.

In such a situation, the party who filed the trial de novo request should be permitted to put an end to the litigation by withdrawing that request and entering judgment on the arbitration award and, if the trial court sees fit, for attorney fees and costs as permitted by RCW 7.06.060. Otherwise, the litigation could go on indefinitely. For example, if this Court agrees that a second trial de novo must take place here, there is no

guarantee there will not be yet another appeal that could result in yet another new trial.

Thus, it is simply not true that allowing the defense to withdraw its trial de novo request *in this case* will allow a party dissatisfied with a trial de novo result to escape it at will. Rather, a party who files a trial de novo request but is unhappy with the trial de novo result must either live with that result *or* successfully pursue an appeal or postjudgment relief. Only if an appeal or postjudgment motion nullifies the trial de novo result may a party withdraw its trial de novo request.[1] Otherwise, the trial de novo result must stand.

3. CR 41 Supports the Defense's Withdrawal of the Trial De Novo Request.

Plaintiff claims that "[j]ust as a party cannot dismiss its . . . own case pursuant to CR 41 once it has rested, . . . a party cannot withdraw[] its request for a trial de novo once a verdict has been reached . . . ." (Corrected Petition 8-9) But when a new trial is granted, "'the case stands as if there had been no trial.'" *Legal Adjustment Bureau v. West Coast Constr. Co.,* 153 Wash. 509, 513, 280 P. 2 (1929). Under CR 41, when a

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[1] Of course, if no trial de novo has taken place at all, the filing party should be able to withdraw his or her request. *See, e.g., Thomas-Kerr v. Brown,* 114 Wn. App. 554, 59 P.3d 120 (2002).

new trial is granted, a voluntary dismissal may be taken ***as a matter of right.***

The undersigned is unaware of any pertinent Washington case law. But many courts elsewhere have held that if a plaintiff is granted a new trial, he or she may take a voluntary nonsuit even though a statute or court rule precludes voluntary nonsuits after trial. *See, e.g., Phelps v. Winona & St. P. Ry. Co.,* 37 Minn. 485, 35 N.W. 273 (1887); *Currie v. Southern Pac. Co.,* 23 Or. 400, 31 P. 963 (1893); *Panzer v. King,* 743 S.W.2d 612 (Tenn. 1988); *Klinge v. Southern Pac. Co.,* 89 Utah 284, 57 P.2d 367 (1936); *Ford Motor Co. v. Jones,* 266 Va. 404, 587 S.E.2d 579 (2003); *Argeropoulos v. Kansas City Rys. Co.,* 201 Mo. App. 287, 212 S.W. 369 (1919); 24 AM. JUR.2D *Dismissal, Discontinuance, & Nonsuit* § 24 (2008).

The basis for this general rule is that the grant of new trial–whether by appeal or by posttrial motion or even mistrial–renders the original verdict or judgment a nullity so that the case stands as if there had been no trial. *See, e.g., Bolstad v. Paul Bunyan Oil Co.,* 215 Minn. 166, 9 N.W.2d 346, 347-48 (1943); *Ford Motor,* 587 S.E.2d at 581. As discussed *supra,* that is the case here: the first appeal nullified the first judgment by ordering a new trial. Hence, this case is in the same posture as if there had never been a trial de novo.

Consequently, plaintiff's reliance on CR 41 does not support her position; CR 41 supports defendants' position.

B. FORCING THE PARTIES INTO A SECOND TRIAL DE NOVO WOULD DEFEAT THE LEGISLATURE'S PURPOSE.

"The purpose of RCW 7.06 authorizing mandatory arbitration in certain civil cases is primarily to alleviate the court congestion and reduce the delay in haring civil cases." *Christie-Lambert Van & Storage Co. v. McLeod,* 39 Wn. App. 298, 302, 693 P.2d 161 (1984). Thus, this Court has several times construed the Mandatory Arbitration Rules to promote this legislative purposes. *See, e.g., Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997); *Roberts v. Johnson*, 137 Wn.2d 84, 89, 969 P.2d 446 (1999); *Wiley v. Rehak,* 143 Wn.2d 339, 20 P.3d 404 (2001). Forcing the parties to go through a second trial de novo *under the circumstances of this case* would defeat that purpose.

By the time the defense sought to withdraw its trial de novo request, the litigation had been ongoing for 6 years. Yet plaintiff seeks to prolong the case even further, contrary to the purpose of the mandatory arbitration that she herself sought.

In fact, plaintiff has unduly prolonged these proceedings already. The trial de novo would have occurred in November 2001, instead of April 2003 if she had timely disclosed her new experts and new medical

evidence. Instead, she waited until *after the September 25, 2001, discovery cutoff date*, even though much of her information dated back to January 2001. At that point, the defense had no choice but to move to strike the new evidence or, in the alternative, obtain a continuance. The trial court elected to grant the continuance.

Furthermore, the first appeal might well not have occurred if plaintiff had simply deposed the defense medical expert, as she had said she would do. Indeed, the defense suggested that she do so.

Instead, six months later, plaintiff utilized an untenable interpretation of CR 35(b) to convince the trial judge to–erroneously–exclude the defense medical expert. The exclusion cut the heart of out of the defense case since it had admitted liability and was arguing that many of plaintiff's injuries were the result of the second accident, not the first. The defense had no choice but to appeal and that appeal was successful.[2]

Plaintiff could have avoided the instant appeal as well. She could have filed her own request for trial de novo. That would have ensured her a trial regardless of whether the defense withdrew its trial de novo request.

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[2] Judge Van Deren's statement that the defense's appeal from the first trial de novo result was unsuccessful is wrong. 146 Wn. App. at 293.

Thomas-Kerr v. Brown, 114 Wn. App. 554, 561, 59 P.3d 120 (2002).

Under these circumstances, compelling a second trial de novo would promote delay and court congestion, not alleviate it. This Court should reject plaintiff's attempt to prolong the litigation even further.

C. EQUITY DOES NOT APPLY HERE.

Plaintiff claims that the equitable doctrines of equitable estoppel, judicial estoppel, and laches apply. Wrong.

1. General Principles of Equity Preclude Equitable Relief Here.

First, "'[s]he who seeks equity must do equity.'" *Malo v. Anderson,* 62 Wn.2d 813, 817, 384 P.2d 867 (1963). Plaintiff has not done equity. She has not come into this appeal with clean hands. Even assuming arguendo that the defense has created unjustifiable delay, plaintiff has also created unjustifiable delay by her failure to timely disclose months old medical evidence and experts and her use of an untenable interpretation of CR 35(b) to exclude the defense medical witness.

Second, "[e]quity aids the vigilant, not those who slumber on their rights." *Leschner v. Department of Labor & Industries,* 27 Wn.2d 911, 927, 185 P.2d 113 (1947). Plaintiff slumbered on her rights by failing to request a trial de novo, which would have ensured that she received one, no matter what defendants did.

Third, equity follows the law. The Legislature expressly recognized that a party could withdraw its trial de novo request by prescribing the potential penalty for doing so. RCW 7.06.060(1). Precluding defendants from doing so would be in contravention of this statute. Equity is not a remedy to circumvent a statute. *See Longview Fibre Co. v. Cowlitz County,* 114 Wn.2d 691, 699, 790 P.2d 149 (1990). None of plaintiff's equitable theories apply.

2. Judicial Estoppel Does Not Apply.

In any event, judicial estoppel applies only to factual positions, not legal positions. 28 AM. JUR.2D *Estoppel & Waiver* § 75, at 502 (2000); *see King v. Clodfelter,* 10 Wn. App. 514, 521, 518 P.2d 206 (1974). If plaintiff's view of judicial estoppel were accepted, a party could never withdraw a claim, objection, or demand. Furthermore, there are no separate legal proceedings as judicial estopped requires: everything has occurred in one lawsuit. *See Armantrout v. Carlson,* 141 Wn. App. 716, 725, 170 P.3d 1218 (2007), *rev. denied,* 164 Wn.2d 1024 (2008).

3. Equitable Estoppel Does Not Apply.

Equitable estoppel also does not apply. To show estoppel, plaintiff must show prejudice in reasonable reliance on defendants' filing of their trial de novo request. But plaintiff cannot claim that she was prejudiced by delay and extra expense, because it is she who is seeking a second trial

de novo, thereby increasing delay and extra expense. Furthermore, any reliance is not reasonable because plaintiff could have ensured herself a trial de novo no matter what the defense did by filing her own trial de novo request. *Thomas-Kerr v. Brown,* 114 Wn. App. 554, 561, 59 P.3d 120 (2002).

Nor can plaintiff claim prejudice in the form of the judgment in her favor after the first trial de novo. That judgment has been reversed and a new trial ordered. Consequently, that judgment is a nullity. *See Legal Adjustment Bureau v. West Coast Constr. Co.,* 153 Wash. 509, 513, 280 P. 2 (1929).

4. Laches Does Not Apply.

Laches is also inapplicable, even assuming it could apply, in the right case, to a trial de novo request. *See Buell v. City of Bremerton,* 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). Laches is an "implied waiver arising from knowledge of existing conditions and acquiescence in them." *Id.* When defendants filed their trial de novo request, they could not know–

- that plaintiff would inexplicably fail to depose their medical expert, even after they suggested she do so;
- that plaintiff would convince the trial judge to exclude the defense medical expert, effectively depriving the defense of a defense;

that the defense would consequently have to file an appeal, albeit a successful appeal. In short, when they filed their trial de novo request, defendants had no knowledge of these conditions and could not have acquiesced in them.

D. PLAINTIFF IS NOT ENTITLED TO ATTORNEY FEES.

Plaintiff claims attorney fees in this appeal and attorney fees for the first appeal. She is not entitled to them, even if she should win this appeal.

1. Plaintiff Is Not Entitled to Attorney Fees for This Appeal.

Noting that the trial court had awarded her attorney fees and costs after the first trial de novo, plaintiff claimed attorney fees and costs "[u]pon prevailing in this appeal and pursuant to MAR 7.3 and RAP 18.1(b)."[3] (Respondent's Brief 25-26) She claims Division II erred in failing to award them. Plaintiff is wrong

First, plaintiff has not yet prevailed in this second appeal. Plaintiff requested attorney fees and costs on appeal only "[u]pon prevailing." (Respondent's Brief 25-26)

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[3] RAP 18.1(b) simply requires a party on appeal to devote a section of its opening brief to its fee request. In the Court of Appeals, plaintiff also claimed attorney fees on the ground that the appeal was frivolous. She did not renew this claim in her petition for review.

Second, even if she does prevail in this second appeal, she would still not be entitled to fees in this appeal, at least at this time. MAR 7.3 requires an award of reasonable attorney fees and costs when "a party who appeals the award . . . fails to improve the party's position on the trial de novo." But at this point, no one knows whether the defendants have failed to improve their position on the trial de novo, because the judgment in the first trial de novo has been nullified by the grant of new trial in the first appeal.

Thus, this case is different than *Tribble v. Allstate Property & Casualty Insurance Co.,* 134 Wn. App. 163, 139 P.3d 373 (2006). In that case, the appeal resulted in a judgment against the party who sought the trial de novo that was greater than the arbitration award against it.

2 Plaintiff Is Not Entitled To Attorney Fees for the First Appeal.

In the first appeal, the panel denied plaintiff's request for attorney fees on appeal. (CP 196) Plaintiff did not renew this request again until her motion for reconsideration from the panel's decision in the *second* appeal. (Motion for Reconsideration 14) This was too late and, in any event, the panel's denial in the first appeal is the law of the case.

First, this Court will not review arguments made for the first time in a motion for reconsideration in the Court of Appeals. *See 1515-1519*

Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp., 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2002).

Second, RAP 18.1(b) requires a party seeking attorney fees on appeal to "devote a section of its opening brief to the request for the fees or expenses." The failure to do so generally results in a denial of attorney fees. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 671, 63 P.3d 125 (2003); *Wilson Court v. Tony Maroni's, Inc.,* 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). Plaintiff could have, but failed to, request fees for the *first* appeal in her opening brief in this second appeal. (Respondent's Brief 25-26) Consequently, fees for the first appeal are not awardable.

Third, the law of the case doctrine precludes revisiting the panel's decision in the first appeal:

> "[Q]uestions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause. The Supreme Court is bound by its decision on the first appeal until such time as it might be authoritatively overruled."

Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)). Previous decisions will be overruled only if "clearly erroneous, and . . . to apply the doctrine would work a manifest injustice to one party" with "no

corresponding injustice" to the other. *Greene v. Rothschild,* 68 Wn.2d 1, 10, 402 P.2d 356, 414 P.2d 1013 (1965).

The denial of attorney fees in the first appeal was not clearly erroneous. Not only had plaintiff not prevailed, there was no longer a judgment against defendants to demonstrate that they had not improved their position in the trial de novo.

V. CONCLUSION

Although a party who has filed a trial de novo request should generally not be permitted to withdraw it once a verdict or judgment has been entered, that is not the case here. Here, the judgment on the verdict was overturned on appeal and a new trial ordered. Under well-established law, both in Washington and other states, the parties were returned to the position they were in before the trial de novo. In that situation, the party who filed the trial de novo request should be able to withdraw it.

It is time to put this case to a rest. The Court of Appeals decision should be affirmed.

DATED this 26th day of June 2009.

REED McCLURE

By _____

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